NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

D&D ASSOCIATES, INC.,	:	CIVIL ACTION NO. 03-1026 (MLC)
Plaintiff,	:	**MEMORANDUM OPINION**
v.	:	
THE BOARD OF EDUCATION OF NORTH PLAINFIELD, et al.,	:	
Defendants.	:	

COOPER, District Judge

This matter comes before the Court on the appeal by D&D Associates, Inc. ("D&D") from an order of the Magistrate Judge dated March 3, 2006. (Dkt. entry no. 122.) For the reasons stated herein, the Court will (1) affirm the part of the order of the Magistrate Judge granting an application for an award of attorney fees, and (2) modify the part of the order setting forth the amount of fees awarded to be consistent with the intent of the order, and affirm as modified.

BACKGROUND

I. Facts

The parties are familiar with the background of this action. (See 9-30-05 Mem.Op. & Ord.; 1-10-06 Mem.Op. & Ord.) Plaintiff, D&D, was the general contractor for various school construction and renovation projects in North Plainfield, New Jersey. (Id.) The construction projects were delayed, and defendant Board of

Education of North Plainfield ("the Board") issued a notice of default to D&D. (Id.) The Board also terminated D&D from the project. (Id.)

D&D brought this action on March 10, 2003, (1) alleging that the Board, and its attorney Robert C. Epstein ("Epstein"), among others, violated D&D's civil rights and breached a contract with D&D, and (2) asserting claims for tortious interference, libel, slander, conversion, and fraudulent inducement. (Am. Compl.) Discovery concluded on March 30, 2006. (Dkt. entry no. 121.) Among other discovery motions, the Board moved to preclude the expert report on damages from trial ("the Simonds Report") prepared by Theresa M. Simonds ("Simonds"), and Arthur Federstein ("Federstein") submitted on behalf of D&D. (Dkt. entry no. 88.) The Magistrate Judge (1) granted the motion to preclude, (2) provided D&D thirty days to submit a new expert report on damages, and (3) determined that the Board's counsel was entitled to reasonable fees and costs associated with the motion. (11-23-05 Order, dkt entry no. 98.) The Board applied for the reimbursement of its fees and costs on December 5, 2005. (Dkt. entry no. 101.) In an order dated March 3, 2006 ("March Order"), the Magistrate Judge ordered D&D to pay the Board $22,530.00 in fees and costs associated with the motion to preclude. (3-3-06 Order, dkt. entry no. 122.) The appeal from that order is now before this Court. (Dkt. entry no. 124.)

II. The Magistrate Judge's Orders

A. The Underlying Motion to Preclude

The Board moved to preclude the Simonds Report on October 14, 2005. (Dkt. entry no. 95.) As articulated by the authors of the report, they had been engaged "to calculate the financial damages incurred by D&D Associates, Inc., ("D&D") due to the alleged actions of [the Board]." (Simonds Report, at 1.)

The Board argued that the report should be precluded because (1) it was an impermissible preliminary report, (2) there was no basis for the opinions rendered, and (3) the report failed to comply with Federal Rule of Civil Procedure ("Rule") 26. (Board Br. in Supp. of Mot. to Preclude, at 9, 11, 23.) D&D argued that the report should not be precluded because (1) the Board was improperly seeking to bar all expert testimony before discovery was complete, (2) the report provided the mandated initial disclosures and would be supplemented pursuant to Rule 26, and (3) the report was a compilation and did not express opinions outside of the authors' expertise. (D&D Br. in Opp'n to Mot. to Preclude, at 9, 11, 15.)

Rule 26 requires parties to disclose the identity of any person who will be providing expert testimony at trial, and to submit a written report prepared and signed by that witness. Fed.R.Civ.P. 26(a)(2). Rule 26(a)(2)(B) outlines what information must be included in the written report. Fed.R.Civ.P.

26(a)(2)(B). The Magistrate Judge, applying Rule 26(a)(2)(B), found that the Simonds Report was

> woefully deficient as it does not provide sufficient bases for the opinions expressed, it is preliminary in nature, without any specific determinations for various amounts of damages or how the damages were calculated, it relied solely on information provided by plaintiff's pleadings and its employees and admitted that the information could not be independently verified.

(11-23-05 Order, at 2.) The Magistrate Judge also determined that the report was insufficient to allow the expert to testify at trial pursuant to Federal Rule of Evidence 702. (Id.) Based on those conclusions, the Magistrate Judge (1) ordered "the report submitted by Theresa M. Simonds . . . precluded from trial," (2) permitted D&D to submit a new report that complied with Rule 26, and (3) indicated that the Board was entitled to reasonable fees and costs pursuant to Rule 37(c). (Id. at 2-3.)

B. The Award of Attorney Fees

The Board, as directed by the Magistrate Judge, submitted a memorandum of services related to the motion to preclude on December 5, 2005. (Dkt. entry no. 101.) The attorneys for the Board sought $32,202.50 in fees and costs. (Id.) D&D opposed the request arguing that the amount sought was "overly excessive," particularly because the Board's motion was "partly denied." (D&D Br. in Opp'n to Attorney Fees, at 5.) The Magistrate Judge (1) adjusted the hourly rate of one of the Board's attorneys, (2) reduced the hours spent preparing the

motion to preclude, and (3) awarded the Board attorneys a reduced fee of $22,530.00. (3-3-06 Order, at 2-4.)

DISCUSSION

D&D argues that the March Order should be reversed because (1) the Board is not entitled to any attorney fees in connection with the motion to preclude because (a) "the Board's motion failed in its fundamental purposes," and (b) D&D's opposition to the motion was substantially justified, and (2) the fees awarded are "heavily excessive and unwarranted." (D&D Br., at 7, 9.) The Board argues that the March Order should be affirmed because (1) the Simonds Report was deficient and sanctions were appropriate, and (2) the amount of fees awarded was reasonable. (Board Br., at 13, 15, 20.)

I. District Court Review of Magistrate Judge Decisions

The district court has authority to review determinations of a magistrate judge. See 28 U.S.C. § 636. A magistrate judge is accorded wide discretion in addressing non-dispositive motions, and an exercise of discretion will be reversed only if there is an abuse of that discretion. Id.; Miller v. Beneficial Mgmt. Corp., 844 F.Supp. 990, 997 (D.N.J. 1993). A district judge may not reverse, modify, or vacate a magistrate judge's order addressing a non-dispositive motion unless the order is "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); Fed.R.Civ.P. 72(a); L.Civ.R. 72.1(c)(1); Cipollone v. Liggett

Group, Inc., 785 F.2d 1108, 1113 (3d Cir. 1986). "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Thomas v. Ford Motor Co., 137 F.Supp.2d 575, 579 (D.N.J. 2001) (internal quotes and cites omitted). Any evidence that was not presented to the magistrate judge cannot be considered by the district court when making a factual determination. Id. at 579.

II. Relevant Discovery Standards

A. Rule 26 Disclosures

Rule 26 requires parties to an action to disclose, inter alia, the names of individuals with discoverable information, a copy of documents that may support claims or defenses, and the identity of any witnesses retained to provide expert testimony. Fed.R.Civ.P. 26(a). A written report prepared and signed by the witness must accompany the identification of an expert witness. Fed.R.Civ.P. 26(a)(2)(B). The report shall contain:

> a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Id.[1] The written report must be "detailed and complete." Fed.R.Civ.P. 26 advisory committee's note (1993 Amendments). Prior versions of Rule 26 did not require the submission of written reports, but the rule was amended because often the initial information disclosed about the content of an expert's testimony was "sketchy and vague." Id. Also, because the deposition of an expert witness cannot be taken until after the witness submits a written report, the length of, or need for an expert's deposition will be often be reduced once a report is submitted. Id.

An expert also is obligated to supplement the written report when additional information becomes available. Fed.R.Civ.P. 26(a)(2)(C). The allowance of supplementary disclosures, however, is "not intended to provide an extension of the deadline by which a party must deliver the lion's share of its expert information." Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 571 (5th Cir. 1996). "The failure to comply with the disclosure requirements of the Rule frustrates the purpose of the Rules- the elimination of unfair surprise and the

[1] For ease of reference, the requirements of what information an expert report must contain can be broken down into six items, (1) how and why the expert reached an opinion, (2) what the expert relied upon when formulating an opinion, (3) exhibits to be used by the expert, (4) qualifications of the expert including publications, (5) expert compensation, and (6) a list of other cases in which the expert has testified previously. Reed v. Binder, 165 F.R.D. 424, 428-29 (D.N.J. 1996).

conservation of resources." Reed, 165 F.R.D. at 431. The trial judge acts as a gatekeeper and has discretion to determine when an expert report is admissible. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999); Yarchak v. Trek Bicycle Corp., 208 F.Supp.2d 470, 494 (D.N.J. 2002).

B. Rule 37 Sanctions

The Magistrate Judge determined that the Simonds Report did not meet the standards set forth in Rule 26, and awarded attorney fees to the Board pursuant to Rule 37(c). (3-3-06 Order.) Rule 37(c) provides:

> [a] party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) . . . is not, unless such failure is harmless, permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court . . . may impose other appropriate sanctions . . . including attorney's fees.

Fed.R.Civ.P. 37(c). "Rule 37 is written in mandatory terms and is designed to provide a strong inducement for disclosure of Rule 26(a) material." Newman v. GHS Osteopathic, Inc., Parkview Hosp. Div., 60 F.3d 153, 156 (3d Cir. 1995).

The imposition of sanctions pursuant to Rule 37 is within the discretion of the court. Id.; Reed, 165 F.R.D. at 431; see also Stein v. Foamex Int'l, No. 00-2356, 2001 WL 856722, at *6 (E.D. Pa. July 23, 2001) ("the Court retains discretion in crafting a remedy for violation of this Rule [26]"). While Rule 37 permits a court to bar an expert's testimony, such a remedy

may be unduly harsh. The rule, therefore, provides the court with discretion to fashion an appropriate remedy. Id. An appropriate remedy may include ordering the non-compliant party to pay the attorney fees and costs of the opposing party. Fitz, Inc. v. Ralph Wilson Plastics Co., 174 F.R.D. 587, 591-92 (D.N.J. 1997) (determining that the plaintiffs' non-compliance with Rule 26 did not mandate the exclusion of the declarations at issue, but required that they compensate the defendants for their legal fees and costs).

Sanctions are not appropriate for failure to comply with Rule 26 when the failure is substantially justified or harmless. Fed.R.Civ.P. 37(c); Newman, 60 F.3d at 156; Fitz, Inc., 174 F.R.D. at 591. Substantial justification requires

> justification to a degree that could satisfy a reasonable person that parties could differ as to whether the party was required to comply with the disclosure request. The proponent's position must have a reasonable basis in law and fact. The test is satisfied if there exists a genuine dispute concerning compliance.

Fitz, Inc., 174 F.R.D. at 591; see also Nguyen v. IBP, Inc., 162 F.R.D. 675, 680 (D. Kan. 1995). "Failure to comply with the mandate of the Rule [26] is harmless when there is no prejudice to the party entitled to disclosure." Reed, 165 F.R.D. at 430. Factors to consider when determining whether a failure was harmless include prejudice or surprise to a party against whom evidence is offered, the ability to cure the prejudice, likelihood of disruption to trial, and bad faith. In re

Mercedes-Benz Anti-trust Litig., 225 F.R.D. 498, 505 (D.N.J. 2005). Prejudice for failure to meet scheduling orders and to respond to discovery may include deprivation of information and "costs expended to force compliance with discovery." Adams v. Trs. of N.J. Brewery Employees' Pension Trust Fund, 29 F.3d 863, 873-74 (3d Cir. 1994); Smith v. Altegra Credit Co., No. 02-8221, 2004 WL 2399773, at *5 (E.D. Pa. Sept. 22, 2004). The party who is alleged to have failed to comply with Rule 26 has the burden of demonstrating substantial justification and harmlessness. Nguyen, 162 F.R.D. at 680.

III. Analysis

D&D appeals from the March Order that directs it to pay $22,530.00 to the Board in connection with the motion to preclude the Simonds Report. D&D has not appealed from the November 2005 order that granted the motion to preclude the report and entitled the Board to attorney fees. (See 11-23-05 Order, dkt. entry no. 98.) The Court, however, must review whether the Simonds Report complied with Rule 26 to determine if a Rule 37 sanction was appropriate. Then, the Court can review whether the award was appropriate. The Court reviews the Magistrate Judge's order for abuse of discretion because whether the Simonds Report is sufficiently compliant with Rule 26 is a matter of degree. See Sierra Club, 73 F.3d at 571 n.46 (noting that where the standard of compliance is a matter of degree, such as whether an initial

expert disclosure is complete, the determination of compliance is appropriately left to the discretion of the trial court and an appellate court should reverse only upon the showing of clear abuse).

A. The Sufficiency of the Simonds Report

The Magistrate Judge precluded the Simonds Report finding that it failed to comply with Rule 26 because, inter alia, it was "woefully deficient," preliminary in nature, and did not provide specific determinations for the amount of damages. (11-23-05 Order.) The report itself indicates that it is a "preliminary assessment of damages." (Simonds Report, at 1.) An examination of the report in light of the six items required to be included in an expert report pursuant to Rule 26 confirms the Magistrate Judge's determination. The preclusion of the report was not clearly erroneous.

Simonds and Federstein indicate in the Simonds Report that they were "engaged to calculate financial damages incurred by D&D Associates, Inc." (Simonds Report, at 1.) The report provides a background of the events leading up to the litigation at issue, and identifies six different "elements" of financial damages to D&D: (1) balances due under the construction contracts, (2) excess expenses incurred due to field directives, (3) the value of D&D's assets that were allegedly converted by the Board, (4) the loss of bonding capacity and the corresponding profits that

would have been realized, (5) legal and professional fees, and (6) expenses incurred in connection with D&D's Chapter 11 bankruptcy filing. (Id. at 5-6.) The report, however, does not explain how or why the damages were grouped into these six elements. Also, the dollar amounts of damages provided in each category are not "complete and detailed," but rather are "vague and sketchy."

The dollar amounts for excess expenses, loss of bonding capacity, and legal and professional fees are incomplete or not up to date. With respect to excess expenses, the report indicates that $1,175,755.00 in excess expenses have been identified to date, but that Simonds and Federstein are in the process of working with D&D and its outside accountants to identify excess expenses. (Id. at 6.) There is, however, no explanation as to what is considered an excess expense, what expenses are included in the $1,175,755.00 figure, or how that figure was calculated. (Id.) The same is true of damages attributed to the loss of bonding capacity. The report indicates that the firm is working with D&D and outside accountants to determine what jobs D&D might have lost due to its lack of bonding capacity, but that "damages are expected to exceed $100,000.00." (Id. at 8.) In the bankruptcy expenses category, there is not even a preliminary estimate as to the fees incurred. The amount of damages related to the Board's alleged conversion

is also incomplete because Simonds and Federstein have not verified the amounts that D&D reported. (Id.) Finally, no overall total damages amount is provided.

The report, as required by Rule 26, does list the items that were relied upon in compiling the report, and Simonds and Federstein's qualifications, including when they have testified in previous cases. The report, however, lacks information regarding what compensation the experts are receiving for the report and testimony. Based on the profiles provided, it is also uncertain whether the experts have authored any publications. (Id. at 11-12.) Overall, most of the damage assessments provided in the Simonds Report are incomplete, and at least one required element is absent. It, therefore, was not clearly erroneous for the Magistrate Judge to conclude that the Simonds Report failed to comply with Rule 26.

D&D has the burden to demonstrate that the failure to comply with Rule 26 was substantially justified or harmless. D&D argues on appeal that "the extensiveness of the defendant's own research in which they (unsuccessfully) sought to find persuasive authority for their motions to preclude and the thoroughness of the plaintiff's responsive brief demonstrates the legitimacy of the plaintiff's position." (D&D Br., at 9.) In its brief opposing the motion to preclude, D&D does not concede that the Simonds Report is a preliminary report, but emphasizes that the

Board will not be prejudiced because the Simonds Report is an initial report that will be supplemented. (D&D Br. in Opp'n to Mot. to Preclude, at 6, 15.) D&D does not offer other justifications in this appeal.

D&D has not satisfied its burden of demonstrating that the Simonds Report's failure to comply with Rule 26 was substantially justified or harmless. The extent of research done relating to the motion to preclude does not explain or provide justification for the incomplete damage totals or absence of information in the Simonds Report. The scheduling order required that "Plaintiff's expert reports on all liability and damages shall be served no later than July 15, 2005. No expert may testify at the time of trial as to any opinions . . . not substantially disclosed in any report." (3-14-05 Scheduling Order.) Reasonable persons could not differ as to what the scheduling order required. While the Simonds Report was an "initial" report, Rule 26 indicates that expert reports are to be a "complete statement." The fact that D&D stated that the report would be supplemented does not cure the deficiencies. As recognized in Sierra Club, allowing supplementary disclosures is not intended to provide an extension of the deadline for the "lion's share" of expert disclosures. See Sierra Club, 73 F.3d at 571.

"A party may not simply retain an expert and then make whatever disclosures the expert is willing or able to make

notwithstanding the known requirements of Rule 26." Nguyen, 162 F.R.D. at 681. "[I]t is no longer acceptable to wait until the last minute to retain and prepare experts. Counsel must be prepared to provide full and meaningful disclosure and discovery at the times required by the rules of procedure and the pretrial scheduling order." Sullivan v. Glock, Inc., 175 F.R.D. 497, 506 (D. Md. 1997). The scheduling order initially provided the parties four months to submit their expert reports. At D&D's request the time period was extended to five months. (See 3-14-05 Order; 6-27-05 Order.)

D&D argues that many of its "business records" are unavailable to it because they are locked in D&D's trailer that was seized by the Board in February 2003. (D&D Br., at 5.)[2] The unavailability of "business records" that pre-date February 2003, however, does not account for the incomplete figures relating to the damages incurred as a result of D&D's bankruptcy filing or legal fees because those fees were incurred after the seizure of the trailer. Also, it is unclear exactly what documents are being referred to as unavailable due to the seizure, and whether they are documents that are necessary to calculate the other elements of damages. The report only indicates that Simonds and

[2] The Simonds Report itself does not specifically indicate that this is the reason for the incomplete figures. The report in the "Background" section that narrates how the cause of action against the Board arose states "[t]hey [the Board] seized D&D's project records and other documents." (Simonds Report, at 4.)

Federstein are working with D&D personnel and D&D's outside accountants to calculate the incomplete figures. (Simonds Report, at 6-8.)

D&D also has not demonstrated that the omissions from the Simonds Reports were harmless. As recognized in Adams, the insufficiency of the report has deprived the Board of relevant information relating to damages. The Board has also incurred fees and costs to ensure that the D&D's expert report complied with Rule 26. See Adams, 29 F.3d at 873-74. "The omission in most reports of the basis and reasons for the opinions is hardly harmless. Nothing causes greater prejudice than to have to guess how and why an adversarial expert reached his or her conclusion." Reed, 165 F.R.D. at 430.

B. The Penalty Imposed

This Court determines that the Magistrate Judge's decision to preclude the Simonds Report was not clearly erroneous. The Magistrate Judge, therefore, had discretion to impose sanctions pursuant to Rule 37.

1. Provision for Attorney Fees

The Magistrate Judge pursuant to Rule 37 precluded the Simonds Report, provided D&D with time to submit a new report, and directed D&D to pay the attorney fees incurred by the Board as a result of the motion to preclude. As discussed supra, Rule 37 provides the Court with discretion to craft an appropriate

remedy, including the award of attorney fees and costs when parties have failed to comply with Rule 26.

There was no abuse of discretion on the part of the Magistrate Judge in awarding attorney fees. As acknowledged in the Advisory Committee's Notes to Rule 37, and accompanying case law, preclusion of evidence is a harsh remedy. The Magistrate Judge recognized that the complete preclusion of a damages report in this action would be severe and "tantamount to summary judgment." (11-23-05 Order, at 2.) The Magistrate Judge, therefore, devised a sanction that would address the deficiency of the Simonds Report without creating an unfair advantage for the Board. Permitting the submission of a new report cures the prejudice to the Board that would result from incomplete information, but does not impair D&D's ability to present evidence on an important aspect of its case. Providing fees for the Board, compensates it for the expenses incurred to secure adequate discovery. See e.g, Fitz Inc., 174 F.R.D. at 591 (awarding attorney fees related to a discovery dispute in lieu of excluding evidence because exclusion would be a "severe sanction" and because the Rule 26 violation was substantially justified"); Reed, 165 F.R.D. at 431 (ordering defendants to bear the costs of expert depositions incurred by the plaintiffs, but not barring the testimony of those experts).

D&D argues that the Board should not be awarded attorney fees because the Board's motion failed in its fundamental purpose; precluding D&D from presenting damages evidence. (D&D Br., at 7.) The Board's motion sought "to preclude this report [the Simonds Report] and all expert testimony based thereon," and any expert evidence on the issue of damages. (Board Br. in Supp. of Mot. to Preclude, at 2, 27.) The Board did succeed in precluding the Simonds Report as evidence of damages. The Magistrate Judge's decision to allow D&D to submit a new report did not make the Board less successful, but rather was necessary to prevent an unfairly harsh result to D&D, and to ensure that this case would be "tried on the merits." (See 11-23-05 Order, at 2.)

2. Amount of the Fees

The party seeking attorney fees has the burden to show that the request for fees is reasonable. Rode v. Dellaciprete, 892 F.2d 1177, 1183 (3d Cir. 1990); Mosaid Techs. Inc. v. Samsung Elecs. Co., 224 F.R.D. 595, 596 (D.N.J. 2004). It must submit evidence stating the hours worked and the rates claimed. Id. The opposing party then has the burden to challenge the reasonableness of the requested fee, by affidavit or brief, with sufficient specificity to give notice. Bell v. United Princeton Props., Inc., 884 F.2d 713, 715 (3d Cir. 1989). The Court cannot

"decrease a fee award based on factors not raised at all by the adverse party." Id. at 720; Rode, 892 F.2d at 1183.

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Id. (internal quotes omitted). Hours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Id. The Court may reduce the hours claimed when (1) the hours are not adequately documented, (2) a party is not successful on a particular matter, or (3) the matters on which the party was unsuccessful are distinct from those upon which the party did prevail. Id. To determine whether the hourly rate is reasonable the Court should look to the prevailing market rate in the relevant community, and the experience and skill of the attorney. Id.

The Magistrate Judge ordered D&D to pay the Board attorneys $22,530.00. (3-3-06 Order.) This Court reviews this award for abuse of discretion. See 28 U.S.C § 636(b)(1)(A); Cipollone, 785 F.2d at 1113. The Board attorneys, as directed by the November 2005 order, submitted a certification of services documenting the hours they spent in connection with the motion to preclude the Simonds Report, and the hourly rates charged by each attorney. (Dkt. entry no. 101.) The attorneys requested fees totaling $32,202.50. The Magistrate Judge awarded less than requested based on three determinations. First, the Magistrate Judge

reduced the hourly rate of one of the attorneys because the attorney did not possess as much experience as another attorney that charged the same rate. (3-3-06 Order, at 2.) Second, the Magistrate Judge found that the amount of time spent on strategy, research, and writing was excessive, and reduced the reasonable hours expended accordingly. (Id.) Third, the Magistrate Judge found that the Board attorneys were not entitled to fees for hours spent analyzing D&D's expert reports because such analysis would have to be conducted regardless of the motion to preclude. (Id. at 3.)

D&D challenges neither a specific entry, nor the hourly rate on appeal, but argues that the March Order should be reversed because "the Board did not meet the burden of demonstrating the reasonableness of its hours and fees, given the rampant over-billing and over-staffing contained therein with no recognition that the motion was only successful in part." (D&D Br., at 11.) This Court determines that the Magistrate Judge's award of attorney fees was not clearly erroneous or contrary to law. The Magistrate Judge, consistent with Rode, considered the reasonableness of the hourly rate charged, the hours expended, and the degree of success of the motion and adjusted the original request accordingly.

The March Order, however, will be modified in one respect. The order recognizes that the Board attorneys' original request

was $32,202.50. The total reduction in fees made by the Magistrate Judge was $10,060.00. Subtracting $10,060.00 from $32,202.50 yields a total fee award of $22,142.50. The body of the March Order reflects this amount in the "total fees awarded" column. (3-3-06 Order, at 4.) The final sentence of the order, however, reads "IT IS on this 3rd day of March 2006 ORDERED that Plaintiff shall pay Defendants reasonable attorneys' fees. . . in the amount of $22,530.00." (Id.) The discrepancy in the two numbers is not explained. The proper amount of fees to be awarded to the Board attorneys therefore is $22,142.50 because it is the difference between the total amount requested and the deductions specifically enumerated in the body of the order.

CONCLUSION

The Magistrate Judge, in deciding the motion to preclude, was vested with discretion to impose sanctions pursuant to Rule 37. The Magistrate Judge's order here was reasoned and not clearly erroneous. This Court, therefore, is not inclined to reverse the Magistrate Judge's decision to award attorney fees to the Board.

The Court, for the reasons stated supra, will affirm and modify the March 3, 2006, order of the Magistrate Judge. The Court will issue an appropriate order.

s/ Mary L. Cooper
MARY L. COOPER
United States District Judge